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6 **UNITED STATES DISTRICT COURT FOR THE**
7 **WESTERN DISTRICT OF WASHINGTON**

8 NORTHWEST COALITION FOR)
9 ALTERNATIVES TO PESTICIDES, *et al.*,)

10 Plaintiffs,)

11 v.)

Case No. C10-1919Z

12 UNITED STATES ENVIRONMENTAL)
13 PROTECTION AGENCY,)

ORDER

14 Defendant,)
15)
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18)
19)
20)
21)

CROPLIFE AMERICA, WASHINGTON)
FRIENDS OF FARMS AND FORESTS,)
OREGONIANS FOR FOOD AND SHELTER,)
RISE (RESPONSIBLE INDUSTRY FOR A)
SOUND ENVIRONMENT);)

22 DOW AGROSCIENCES, LLC; and)

23 WILLAPA/GRAYS HARBOR OYSTER)
24 GROWERS ASSOCIATION,)

25 Defendant-Intervenors.)
26)
27)
28)

22 This matter comes before the Court on a motion to stay by Intervenor Defendant
23 Dow AgroSciences, LLC (“Dow AgroSciences”), docket no. 44, and a motion to stay by
24 Defendant United States Environmental Protection Agency (“EPA”), docket no. 48. The
25 Court hereby GRANTS in PART Defendant Dow Agroscience's motion, GRANTS
26 EPA’s motion, and STAYS this case until December 30, 2011 or further order of the
27 Court. The Court directs the parties to file a joint status report by December 30, 2011 or
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1 within 30 days of a decision in Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.,
2 No. 09-cv-00824 (D. Md.), whichever comes first, advising the Court of the ongoing
3 posture of that case.

4 **I. BACKGROUND**

5 On July 2, 2002, this Court found the EPA in violation of section 7 of the
6 Endangered Species Act (“ESA”) for failure to consult with National Marine Fisheries
7 Service (“NMFS”) to ensure that 54 registered pesticides would not jeopardize listed
8 salmonid species. Washington Toxics Coal. v. Env'tl. Prot. Agency, No. C10-132C, slip
9 op. at 20 (W.D. Wash. July 2, 2002), aff'd, 413 F.3d 1024 (9th Cir. 2005). In 2007, after
10 having been sued by Northwest Coalition for Alternatives to Pesticides and others for
11 failure to complete those consultations, NMFS entered into a consent decree agreeing to
12 issue biological opinions on 37 of the pesticides that EPA determined “may affect” listed
13 salmonids.

14 On November 18, 2008, NMFS issued the first biological opinion (“OP BiOp”),
15 concluding that the continued use of the organophosphate pesticides diazinon, malathion,
16 and chlorpyrifos would jeopardize the continued existence of 27 species of salmon and
17 steelhead and would destroy or adversely modify the critical habitat for 25 of those
18 species. OP BiOp at 391. On April 20, 2009, NMFS issued the second biological
19 opinion (“Carbamate BiOp”) concluding that EPA’s registration of pesticide products
20 containing carbaryl and carbofuran jeopardize 22 listed Pacific salmonids and likely
21 destroy or adversely modify the habitat of at least 20 listed Pacific salmonids. Carbamate
22 BiOp at 488. NMFS also found that pesticide products containing methomyl jeopardize
23 18 listed Pacific salmonids and likely destroy or adversely modify the habitat of at least
24 16 Pacific salmonids. Id.

25 In April of 2009, pesticide registrants filed suit against NMFS in the U.S. District
26 Court for the District of Maryland alleging that the OP BiOp was flawed. Dow
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1 AgroSciences LLC v. Nat'l Marine Fisheries Service, 638 F. Supp. 2d 508 (D. Md.
2 2009). The Maryland District Court determined that the Federal Insecticide, Fungicide,
3 and Rodenticide Act's exclusive jurisdiction provision required plaintiffs to bring their
4 challenge in the Court of Appeals. The Fourth Circuit reversed and remanded on March
5 2, 2011. Dow AgroSciences LLC v. Nat'l Marine Fisheries Service, 637 F.3d 259 (4th
6 Cir. 2011). The briefing schedule in the remanded District of Maryland case requires the
7 parties to complete their summary judgment briefing by September 2, 2011. Joint
8 Stipulation on Case Schedule (Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.,
9 No. 09-cv-00824 (D. Md.), docket no. 42).

10 On November 29, 2010, alleging that EPA had not taken any steps to implement
11 the Reasonable and Prudent Alternatives ("RPAs") and the Reasonable and Prudent
12 Measures ("RPMs") articulated in the BiOps, nor taken any alternative protective
13 measures, Plaintiffs brought this suit seeking to enjoin EPA's authorization of the uses of
14 diazinon, malathion, chlorpyrifos, carbaryl, carbofuran, and methomyl that do not comply
15 with the RPAs and RPMs. Am. Compl. at ¶¶ 10, 11 (docket no. 40).

16 Defendant EPA has moved to stay this case for six months, through December 30,
17 2011, noting that a decision is likely to be issued in the District of Maryland case before
18 then. Defendant Dow AgroSciences has moved to stay this case pending a decision in the
19 District of Maryland case, with no date restriction.

20 **II. DISCUSSION**

21 A trial court may stay an action before it, pending resolution of independent
22 proceedings which bear upon the case. Leyva v. Certified Grocers of California, LTD.,
23 593 F.2d 857, 863 (9th Cir. 1979). "This rule applies whether the separate proceedings
24 are judicial, administrative, or arbitral in character, and does not require that the issues in
25 such proceedings are necessarily controlling of the action before the court." Id. To
26 determine whether a stay is warranted, the court must weigh (1) the possible damage
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1 which may result from granting the stay; (2) the hardship or inequity which a party may
2 suffer in being required to go forward; and (3) the “orderly course of justice measured in
3 terms of the simplifying or complicating of issues, proof, and questions of law which
4 could be expected to result from a stay.” Lockyer v. Mirant Corp., 398 F.3d 1098, 1110
5 (9th Cir. 2005).

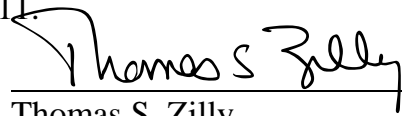
6 Plaintiffs are bound by their complaint. Cafasso, U.S. ex rel. v. General Dynamics
7 C4 Systems, Inc., 637 F.3d 1047, 1060 n.13 (2011). Plaintiffs’ complaint is premised on
8 the findings of NMFS’ BiOps. See Generally, Am. Compl. As the validity of one of
9 these BiOps is currently being disputed in Maryland District Court, and Plaintiffs’ claims
10 under the undisputed BiOp will require briefing on many of the same legal and factual
11 issues, judicial resources would be properly conserved by granting a limited stay. While
12 the Court is aware of the alleged harm to endangered steelhead and salmon, it is also
13 aware that Plaintiffs are not seeking a preliminary injunction in the present case, and
14 waited over a year and a half after NMFS issued the Carbamate BiOp and two years after
15 NMFS issued the OP BiOp to file suit. Accordingly, Plaintiffs will not be unduly harmed
16 by a limited stay. See Pesticide Action Network North Am. v. Env’tl. Prot. Agency, No.
17 08-cv-1814 MHP, 2008 WL 5130405 (N.D. Cal. Dec. 5, 2008).

18
19 **III. CONCLUSION**

20 For the foregoing reasons, the Court hereby STAYS this case until December 30,
21 2011, or further order of the Court.

22 IT IS SO ORDERED.

23 DATED this 30th day of June, 2011.

24 
25 Thomas S. Zilly
26 United States District Judge
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